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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The briefs by respondents National Labor Relations Board ("NLRB" or "The Board") and "Automatic" Sprinkler Corporation of American and Figgie International Inc. ("Automatic") in opposition to our certiorari petition present a veritable encyclopedia of obfuscation -- *viz.*, of the techniques of purporting to respond to, and to rebut a certiorari petition's "reasons for granting the writ" while studiously refusing to join issue on the points made in the petition.

We therefore briefly restate each of the two basic questions presented and our showing as to why these questions require consideration by this Court -- in order to refocus what respondents seek to obscure. As to each of these questions, we

then briefly demonstrate that, while respondents' briefs in opposition cover some 35 pages with type, those pages do not make a single point of substance that controverts our showing. In the end, our "reasons for granting the writ" remain unrefuted and, we submit, call for a certiorari grant here.

1. (a) The first question our petition presents is whether the NLRA §§ 7/8(a)(3) employee right to select and to act through a collective bargaining representative free from unlawful employer discrimination can be waived through the inclusion in a collective bargaining agreement of a general contract clause authorizing a generic type of employer business action -- such as subcontracting unit work or making periodic wage adjustments -- notwithstanding this Court's admonition that the policies of the NLRA do not provide for the contractual waiver of "unlawful practices destructive of the foundation on which collective bargaining must rest." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280-83 (1956); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 706, n.11 (1983).

We pointed out that the Sixth Circuit's decision in this case is at odds both with this Court's decisions in Mastro Plastics and Metropolitan Edison, and with the Tenth Circuit's recent decision in Capitol Steel and Iron Co. v. NLRB, 89 F.3d 692, 697 (10th Cir 1996) (affirming an NLRB decision and rejecting the claim that a collective bargaining agreement permitting individual wage increases waived employees' statutory right against employer's selective imposition of mid-term wage increases motivated by an intent to undermine the union's status as the employees' bargaining representative).[1]

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[1]Automatic would distinguish Capitol Steel from the instant case in that the employer's conduct in that case consisted of "raising wages in a manner engineered to influence employees to vote at a key moment in

And, we stressed that the NLRA waiver doctrine questions presented here go to the very essence of the Act and that the longstanding uncertainty in the governing law, as exacerbated by the decision below, puts the NLRA collective bargaining system under the most severe strain in a way that threatens its productive capacities. Pet. 9-21.

(b) Automatic proceeds by simply pretending that no such question is presented. According to the Company, "the issue over which Petitioner now claims conflict is whether an expressed contractual provision contained in a collective bargaining agreement acts as a waiver of the union employees' right to bargain over important NLRA rights." Automatic Opp. at 8.

But the question so kindly "[re]framed" for us by Automatic as the *only* question presented bypasses the first question presented in our petition and tracks the second question we presented. And, contrary to Automatic, *both* of these questions *are* presented by this case.

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the bargaining process" and Automatic's conduct in this case, as found by the NLRB, was the "subcontract[ing of] the unit work... motivated [by a desire] ... to rid itself of union-represented employees." Automatic Opp.. at 16-18. See Pet. App. 30a.

The point would appear to be that while Capitol Steel's "unlawful practice" *is* "destructive of the foundation on which collective bargaining must rest," an employer's subcontract of an entire bargaining unit's work and the discharge of all unit employees "in order to rid itself of union-represented employees" is not. The opposite is true. While suborning bargaining unit employees so as to undermine their support for their union representative is reprehensible and destructive, that wrong pales in comparison to a maneuver to discharge an entire workforce because the employees have selected and bargained through a union and so as to replace the union employees with a non-union workforce.

With regard to the §§ 7/8(a)(3) employee rights waiver issue here, the Board ruled that

> [a]lthough the clauses do permit subcontracting to other employers signatory to incumbent unions' agreements, they certainly do not permit subcontracting to nonunion firms, nor do they prohibit bargaining on subcontracting upon the expiration of the collective-bargaining agreements. They do not waive the right to bargain over a decision to destroy bargaining units through the use of subcontracting or the implementation of such a decision. [Pet. App. 83a]

And, the court of appeals, *inter alia*, overturned that ruling stating:

> *Regardless* of whether [Automatic] met [its] burden [of disproving that its decision to completely subcontract out all unit work was motivated by antiunion animus in violation of § 8(a)(3)]... [its] actions were *justified* under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that Petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is *legally* erroneous. [Pet. App. 15a, emphasis added.]

(c) While the NLRB has the grace to recognize that there are two questions properly presented here, the Board professes to have doubts as whether the Sixth Circuit actually decided the §§ 7/8(a)(3) employee rights waiver issue that the court said it was deciding in the above-quoted passage, and also as to whether the Sixth Circuit's ruling on that issue is one of

"general application" or is instead based solely on "the particular facts of this case." NLRB Opp. at. 11-13.

As to the first "doubt," it is difficult to understand how anyone could misunderstand the brutally direct language of the court of appeals. To be sure, the Board observes that the court of appeals' holding was expressed in a "few words," rather than many, and without "address[ing]" the "consist[ency]" of the ruling with decisions "of this Court or other courts of appeals," from which the Board concludes that the decision is "limited to the particular facts of [the particular] case." NLRB Opp. at 11. With all due respect to the Board's skill in the deconstructive reading of texts, the court of appeals' ruling is phrased so as to leave no doubt that it is of general application and not limited to the facts of this case. And, of course, the Board's suggestion as to how to parse court of appeals decisions is an invitation to the worst kind of decision-making through review-resistant *ipse dixit*.

As to the second of the Board's "doubts," the court of appeals expressly disavowed any intent to quarrel with, much less to overrule, the Board's factual findings. Pet. App.4a-5a.

The truth of the matter is that the Board was more candid and accurate in its petition for rehearing to the Sixth Circuit than it chooses to be with this Court:

> The issues raised [by the Sixth Circuit's "waiver" analysis] are important and likely to recur. Union signatory subcontracting clauses like those considered by the panel majority have long been part of the pattern of bargaining in the construction industry... The panel majority's holding that such clauses are a license to discriminate against employees who select union

> representation pose a serious danger both to the right of employees to be represented by unions of their own choosing and to the stability of the many collective bargaining agreements that include identical subcontracting clauses. [NLRB Reh. Pet. at 3-4.]

And, as to whether the Sixth Circuit's opinion is tied to "the particular facts of this case," NLRB Opp. at 13, the Board's petition for rehearing also recognized that the Sixth Circuit decided a "legal issue" and that, in so doing, the court below issued a ruling that "is in conflict with controlling authority that unions may not validly contract away the employees' free choice in the selection of a bargaining representative." NLRB Reh. Pet. at 7-8.[2] Indeed, nothing could be more clear than that the issue of a contractual waiver of statutory rights is an intrinsically *legal* rather than factual question. See e.g. C&P

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[2]In another of its deep readings of the Sixth Circuit's decision, the Board suggests that the court below "viewed this case as involving a situation more like that in First National Maintenance [Corp. v. NLRB, 452 U.S. 666 (1981)], which held that the Act did not mandate bargaining about an employer's decision to change significantly the nature of its business." NLRB Opp. at 13. This intuition does not buttress the decision below or make it one "turn[ing] on the particular facts of this case" (NLRB Opp. at 13), but rather suggests that the court of appeals rested its decision on a different error of law. For, as the Board itself pointed out in its petition for rehearing to the Sixth Circuit, as well as in its decision below,

> even if... those subcontracting decisions more closely resembled the partial closing decisions that... [have been] held outside the duty to bargain... decisional law holds that partial closing decisions are subject to the duty to bargain if motivated by antiunion animus. [NLRB Reh. Pet. at 11, citing First National Maintenance, supra, 452 U.S. at 673 n.9, 682 and 687-88.]

See Pet. App. 32a.

Telephone Co. v. NLRB, 687 F.2d 633, 636 (2nd Cir. 1982).[3]

The Sixth Circuit's decision thus squarely presents the question whether a general clause in a collective bargaining agreement can be held to "waive" the covered unit employees' §§ 7/8(a)(3) rights -- an *important* question on which the law is uncertain.

2. The second question presented is whether an alleged contractual waiver of the NLRA §§ 7/8(a)(5)/8(d) employee rights to bargain is governed by the "clear and unmistakable" waiver standard or the "contract coverage" waiver standard. As we showed in our petition, there is a widespread, long standing division in the courts of appeals on this important question that pits the First, Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits against the D.C., Seventh, and Sixth Circuits. Pet. at. 21-25.[4] The respondents offer rebuttals to our showing

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[3]The Board's assertion that Automatic "did not raise the subcontracting clause as a defense to the Section 8(a)(3) charge before the National Labor Relations Board..." (NLRB Opp. at 11) is simply incorrect. See, e.g., Automatic's Answer to the NLRB Complaint, para. 35 ("...the allegations of the Complaint are barred by the express and unequivocal waiver by [the Unions]... in that the collective bargaining agreements... permit... unlimited subcontracting"); Automatic's Exceptions to the Administrative Law Judge's decision, p.47 ("During the term of the respective Contracts... there had been... a clear and unequivocal waiver on the part of the charging party unions for [Automatic] to engage in subcontracting without limitation...").

[4]The recent and unpublished D.C. Circuit decision in Midwest Power Systems v. NLRB, No. 97-1251 [1998 U.S. App. LEXIS 4725] (D.C. Cir. Feb. 18, 1998) denying enforcement and remanding 323 NLRB No. 61 (1997), is further evidence, if any be needed, that the conflict among the circuits over which legal standard governs alleged contractual waivers of a statutory right persists unabated. The court noted that:

...in order to determine the effect of the reservation clause

that contradict -- and thus cancel out -- each other.

Automatic attempts to paper over the circuit split on this issue by claiming that the contract coverage standard of the Seventh and D.C. Circuits is "completely in keeping" with the "clear and unmistakable" waiver test employed by the majority of the circuits. Automatic Opp. at 14. In so doing, Automatic takes its turn at reinventing itself for purposes of opposing our petition. For Automatic argued to the Sixth Circuit that the court of appeals should reverse the NLRB's § 8(a)(5) unfair labor practice finding because the Board had committed error in applying a "clear and unmistakable" waiver standard rather than a "contract coverage" standard. Automatic grounded this argument in the recent Seventh and D.C. Circuit caselaw rejecting the "clear and unmistakable" waiver standard in favor

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> [incorporated by reference into the union agreement], we must decide if the proper inquiry is, as the Board assumed, whether there was a "waiver" of bargaining rights or rather if the inquiry should be whether the subject matter was "covered by" the collective bargaining clause. The former inquiry would require a determination of whether the surrender was "clear and unmistakable"; the latter would require application of the usual rules of contract interpretation. 1998 U.S. App. LEXIS 4725 at *4-*5.

The court granted the petition for review, denied enforcement of the NLRB's order, and remanded the case to be Board for consideration of whether that case could be decided "on narrower grounds," rather than undertake to "plunge into the thicket" presented by the foregoing passage and as exemplified by the Sixth Circuit's decision in this case. The Midwest Power Systems decision was issued under D.C. Cir. Rule 36(b) and we are "not citing [it] for precedential value but only... to show that the issue now before this court has been raised by other... circuits." U.S. v. One Parcel or Real Property, 908 F. Supp. 1070, 1076 n.3 (D.R.I. 1995).

of the "contract coverage" standard.[5]

The Board, in its turn, responds that, from time to time, the Sixth Circuit has cited both of the conflicting standards of waiver of statutory rights. NLRB Opp. at 13 and n.6. But confusion and disarray, *within a court of appeals* as well as among the circuit courts, underlines rather than undermines the depth of the conflict, the confusion in the lower courts and the need of this Court's review.

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[5] "...[B]y undertaking the 'waiver' analysis, the Board employed the wrong legal standard [and] this court must vacate and deny enforcement to the Board's order." Automatic Br. to the Sixth Circuit at pp.30, 27 citing, *inter alia*, NLRB v. U.S. Postal Service, 8 F.3d 832, 833 (D.C. Cir. 1993) ("The subject of subcontracting is therefore 'covered by' the collective bargaining agreements, such that 'waiver' analysis is inapposite ... [and] by undertaking the 'waiver' analysis, the Board employed the wrong legal standard ...") and Chicago Tribune Co. v. NLRB, 974 F. 2d 933, 936-37 (7th Cir. 1992) ("we wonder what the exact force of the 'clear and unmistakable' principle can be... or whether the principle makes much sense...").

CONCLUSION

For the reasons stated herein and in our petition, Local 669 urges that certiorari be granted.

Respectfully submitted,

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